No. 189

IN THE

# Supreme Court of the United States

OCTOBER TERM A. D. 1963

ATLANTIC MUTUAL INSURANCE COMPANY,
*Petitioner,*

*vs.*

POSEIDON SCHIFFAHRT G.m.b.H.,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PAUL H. HEINEKE
Proctor for Petitioner

HEINEKE, CONKLIN & SCHRADER
135 South LaSalle Street
Chicago 3, Illinois
236-6655

The Scheffer Press, Inc.—ANdover 3-6850.

## SUBJECT INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction of the Court | 2 |
| Questions Presented | 2 |
| Statute Involved | 2 |
| Statement of the Case | 2 |
| Conclusion | 6 |
| Appendix: | |
| A—Opinion of the United States Court of Appeals, Seventh Circuit | 1a |
| B—Order on Opinion | 7a |
| C—Order, denying Rehearing | 8a |
| D—The Carriage of Goods by Sea Act, 46 U.S.C.A. §§ 1304 | 10a-13a |


### TABLE OF CASES.


| | |
|---|---|
| Jones v. The Flying Clipper, 116 F. Supp. 386 (SDNY 1953) | 5 |
| Stag Line Ltd. v. Foscolo, Mango & Co., Ltd. [1932] A.C. 328, 41 Ll. L. Rep. 165 | 5 |


### STATUTES.


| | |
|---|---|
| 28 U.S.C. § 1254(1) | 2 |
| 46 U.S.C.A. §§ 1300-1315 | 2, 10a-13a |
| 46 U.S.C.A. § 1304(5) | 2 |
| 28 U.S.C. § 1333 | 3 |

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1963

---

**No.**

---

ATLANTIC MUTUAL INSURANCE COMPANY,
*Petitioner,*

*vs.*

POSEIDON SCHIFFAHRT G.m.b.H.,
*Respondent.*

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

*To The Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:*

## Opinions Below.

Atlantic Mutual Insurance Company respectfully petitions this Court for the issuance of a writ of certiorari herein to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decree of the United States District Court for the Northern District of Illinois, Eastern Division. The opinion of the Court of Appeals is reported at 313 F. 2nd 872 and is set out in the appendix hereto. The District Court's opinion is reported at 206 F. Supp. 45 and is found at page 12 in the record printed for use in the Court of Appeals.

## Jurisdiction of the Court.

The Court's jurisdiction to review the judgment is invoked pursuant to 28 U.S.C. § 1254 (1). The judgment was entered February 8, 1963 and the order denying petitioner's motion for rehearing was entered March 12, 1963.

## Question Presented.

The question presented for review concerns the construction of the Carriage of Goods by Sea Act, 46 U.S.C.A. §§ 1300-1315, the United States implementation of the 1924 Brussels International Convention for the Unification of Certain Rules Relating to Bills of Lading, commonly known as the Hague Rules. Is an ocean carrier which unreasonably deviates from its contract of carriage by transporting the goods to a destination other than that agreed and subsequently delivering the goods at the agreed destination a year and a half late entitled to the benefit of the package limitation of 46 U.S.C.A. § 1304 (5) of the Carriage of Goods by Sea Act.

## Statute Involved.

The Carriage of Goods by Sea Act, 46 U.S.C.A. §§ 1300-1315. Section 1304 of that Act is set out in full in the appendix hereto.

## Statement of Case.

Petitioner insured a certain package containing ironing machine pads against all risk of loss during transit from Chicago to Brussels, Belgium. The said package was delivered by the shipper to respondent Poseidon Schiffahrt G.m.b.H., as a common carrier, at Chicago on November 17, 1957. Respondent loaded the shipment on its vessel, the SS Herman Schulte, and issued its bill of lading for transportation and delivery to the shipper's order of Ant-

werp. The bill of lading did not contain an excess valuation clause.

The SS Herman Schulte arrived at Antwerp December 14, 1957 but the package could not be found and there was no delivery. On March 13, 1958, petitioner paid the consignee-owner of the goods the sum of $1,070 by reason of the loss.

In October of 1958, petitioner learned that respondent had located the goods at Hamburg, Germany, and on June 16, 1959 the package was delivered to petitioner's order at Antwerp. The package of ironing machine pads, valued at the time of shipment at $929.66, was ultimately sold for the net sum of $204.66.

Petitioner brought this action in admiralty pursuant to 28 U.S.C. § 1333 to recover the difference between the original value of the goods and the figure at which they were ultimately sold, as subrogee of the rights of the consignee-owner. The District Court decreed that petitioner recover damages, but further held that the respondent's liability was limited to $500 by virtue of 46 U.S.C.A. § 1304 (5). The Court of Appeals affirmed.

Problems of ocean carriage and deviation have been before this Court on numerous occasions. No case, however, has been presented involving the inter-relationship of deviation, a time-honored doctrine of the general maritime law, and the Carriage of Goods by Sea Act of 1936. The case is one of first impression in this Court and involves an important question of Federal law.

For years the law was well established that a deviating carrier lost the exemptions and limitations of its contract of carriage, including the package limitation, and was liable for the full value of the goods damaged or lost. It was the understanding of the industry that the economic loss

incurred by reason of cargo damage was to be allocated between cargo and carrier on this basis. Shipping practices and insurance rates reflected this view and cargo damage claims and litigation were so settled and disposed of between shippers, carriers and their respective underwriters.

The court below holds that the Carriage of Goods by Sea Act changed this historically settled and internationally recognized rule of the maritime law and abolished the punishment meted out to the unreasonably deviating carrier. This has upset the economic balance between carrier and cargo and shifted from the carrier an economic burden previously borne and placed it on cargo. The financial consequence of this shift of risk of loss is incalculable. The question of whether the Carriage of Goods by Sea Act has abolished the law of deviation is one of tremendous import to those engaged in shipping, international trade and marine insurance. If the Court of Appeals decision is to be the law of ocean carriage in the United States, it should receive the stamp of approval of this Court.

The Hague Rules, as their formal title indicates, were formulated by the diplomatic body meeting at Brussels to secure international uniformity in the relations of carrier and cargo in international transportation by water. Uniformity and certainty in international commercial relations are goals concerning which world commercial interests are unanimous in seeking. All major maritime nations have adopted the Hague Rules as their law of ocean carriage.

In the interpretation and construction of a statute designed to implement an international agreement whose purpose is international uniformity, it seems meet to

examine the decisions of the highest courts of other nations which have adopted equivalent legislation. The interpretation of the Hague Rules given by the court below is wholly at variance and is in conflict with the interpretation of those Rules by the House of Lords. *Stag Line, Ltd.* v. *Foscolo, Mango & Co., Ltd.* [1932] A.C. 328, 41 Ll. L. Rep. 165.

The Southern District of New York, having within its bounds the world's leading port and center of shipping and marine insurance, has long been a fountainhead of admiralty jurisprudence. It also has held, in the case of *Jones* v. *The Flying Clipper*, 116 F. Supp. 386 (SDNY 1953), the only other decision of a court of the Federal judicial system squarely meeting the issue, that the Hague Rules legislation made no change in the law as to the effect of unreasonable deviation. It is suggested that opinions of courts such as the House of Lords and the Southern District of New York on this subject carry great weight and when in conflict with the decision below, justly create in the minds of those affected by its impact an uncertainty which should be settled by this Court.

## Conclusion.

Petitioner respectfully requests that this Court grant its prayer for writ of certiorari to review the decision herein of the Court of Appeals for the Seventh Circuit. Uncertainty now exists, both on the domestic and international levels, as to the correct construction of a Federal statute in a field of law exclusively Federal. The question presented is of tremendous importance to the commercial world and should be settled by this Court.

Respectfully submitted,

PAUL H. HEINEKE
*Proctor for Petitioner*

HEINEKE, CONKLIN & SCHRADER
135 South LaSalle Street
Chicago 3, Illinois
236-6655

## APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOS. 13826-7 SEPTEMBER TERM, 1962—JANUARY SESSION, 1963

ATLANTIC MUTUAL INSURANCE COMPANY,
*Libellant-Appellant,*
No. 13826 v.
POSEIDON SCHIFFAHRT, G.m.b.H.,
*Respondent-Appellee.*

ATLANTIC MUTUAL INSURANCE COMPANY,
*Libellant-Appellee,*
No. 13827 v.
POSEIDON SCHIFFAHRT, G.m.b.H.,
*Respondent-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

February 8, 1963

Before HASTINGS, *Chief Judge*, CASTLE and MAJOR, *Circuit Judges.*

HASTINGS, *Chief Judge*. This is an action in admiralty to recover damages for breach of contract for the carriage of cargo between Chicago, Illinois and Antwerp, Belgium. The case was submitted to the district court on a stipulation of facts. The district court in its memorandum opinion and order held that libellant, Atlantic Mutual Insurance Company, should recover damages; that overcarriage of

the goods to Hamburg, Germany and delay of a year and a half in making delivery at Antwerp was an unreasonable deviation; and that libellant's recovery was limited to $500 pursuant to the package limitation of § 4(5) of the Carriage of Goods by Sea Act, Title 46, U. S. C. A. § 1304(5).

Libellant appealed, claiming the district court erred in limiting its recovery to $500. Respondent, Poseidon Schiffahrt, G.m.b.H., cross appealed, claiming libellant had failed to properly prove any damages.

About November 17, 1957, at Chicago, Illinois, Resillo Company delivered one carton containing ironing machine pads to respondent for transportation to Antwerp, Belgium on board respondent's vessel, SS Herman Schulte. The goods were consigned to order of shipper and had been sold by shipper to consignee, Societe Belge Reineveld of Brussels, Belgium. The bill of lading did not contain an excess valuation pursuant to 46 U. S. C. A. § 1304(5).

The carton was not delivered to consignee upon arrival of the SS Herman Schulte at Antwerp about December 14, 1957. Instead, it was located eight months later in Hamburg, Germany.

In the meantime, libellant had paid consignee $1,070 for its loss pursuant to the insurance contract between them.

On June 16, 1959, approximately eighteen months after the contemplated date of delivery, respondent delivered the goods to libellant. Libellant then offered the goods to consignee on condition that the latter would refund the $1,070 that had been paid it, but consignee refused.

After making efforts without success to find other purchasers, libellant sold the ironing machine pads to consignee for the net sum of $204.66. It was stipulated by the parties that this was the highest bid received from consignee.

The amount sought by libellant in this action, $725, represents the approximate difference between the amount it paid consignee for the loss and the amount libellant received from consignee in mitigation.

We must first determine whether the district court was correct in holding that respondent was guilty of an unreasonable deviation.

Section 4(4) of the Carriage of Goods by Sea Act (herein called the Act), 46 U. S. C. A. § 1304(4) provides:

> "Any deviation in saving of attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom; *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

This section contains the only reference to "deviation" found in the Act. It does not define "unreasonable" deviation nor does it declare what the legal effect of an unreasonable deviation shall be. It is our opinion that by this section Congress recognized the doctrine of deviation as it had developed in maritime law but chose to make the carrier liable only for an unreasonable deviation.

We agree with the district court's analysis of the law on this point. In its memorandum opinion it stated:

> "Prior to the passage of this Act in 1936, there was little doubt that overcarriage beyond and to a different port than the contracted destination was a material 'deviation'. *Nile-Benant-Pond Co.* v. *D S A/S Balto*, 282 Fed. 235; *General Electric Co.* v. *Argonaut Steamship Line, Inc.*, 7 Fed. Supp. 710. And in at least one case decided subsequent to the Act, it has been recognized that overcarriage is a material deviation. *Shackman* v. *Cunard White Star*, 31 Fed. Supp. 948 (1940).
>
> "A delay of one and one-half years in delivery is in itself a material deviation, regardless of the fact of overcarriage. *The Citta di Messina*, 169 Fed. 472 (1909); *The Hermosa*, 57 F. 2d 20 (1932). All of these

cases indicate that such material 'deviations' constitute fundamental breaches of the contract of shipment.

"There should be no doubt in the instant case that the overcarriage here, coupled with the one and one-half year delay in delivery, constitutes indeed an 'unreasonable deviation' justifying rescission of the contract of shipment, under the law, either before or after the enactment of the Carriage of Goods by Sea Act. What happened to the goods was, under the least strict application of the law, an entirely different venture from that contemplated by the parties."

As a result of the rescission of the contract of carriage arising out of the unreasonable deviation, the contract is treated as not having existed, and the liability of the carrier becomes that of an insurer. *S. S. Willdomino* v. *Citrd Chem. Co.*, 272 U. S. 718 (1927).

The district court held, however, that respondent's liability was limited to $500 by § 4(5) of the Act, 46 U. S. C. A. § 1304(5). We agree. This section of the Act provides:

"Neither the carrier nor the ship shall in *any event* be or become liable for *any loss or damage* to or in connection with the transportation of goods, in an amount exceeding $500 per package lawful money of the United States • • • unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. • • •" (Emphasis added.)

It appears that the specific problem under consideration here has been discussed in only one other case, *Jones* v. *The Flying Clipper*, D. C. S. D. N. Y., 116 F. Supp. 386 (1953). The parties have cited only this case, and our research has revealed no other. In the *Jones* case, the court held this limitation inapplicable where the carrier was guilty of an unreasonable deviation. While that case is distinguishable because the Act did not apply there of its own force but by incorporation in the bill of lading, the district court stated that this factor would not change the result.

In *Jones*, the court reasoned that the doctrine of deviation was so firmly entrenched in maritime law that such a drastic change would have been expressed in clear and unmistakable language. The court found no such language in the Act.

We respectfully disagree with this reasoning and adopt that of the district court in the instant case:

> "There is no question about the fact that prior to the enactment of the Carriage of Goods by Sea Act, the doctrine of unjustifiable deviation was firmly entrenched in maritime law. This doctrine had developed to circumvent the efforts of carriers to avoid justifiable liability through insertion in shipping contracts and bills of lading of provisions for minimum limitation of liability. It is equally certain that Congress may not be found to have changed existing law without expressing this change in clear and unmistakable terms. But it appears to this Court that the language of the statute, if it constitutes a change of existing law, according to the rule applied to other statutes, is sufficiently clear and unmistakable. No amount of interpolation is required to evaluate the weight of the phrases 'in any event' and 'any loss or damage' upon the admonition that 'neither the carrier nor the ship shall in any event be or become liable for any loss or damage . . . unless . . .'"

In addition to the reasons stated by the district court, our conclusion finds support in the fact that the package limitation immediately follows § 4(4) of the Act, 46 U. S. C. A. § 1304(4) in which Congress, as we have already stated, recognized the carrier's liability for unreasonable deviations. It is difficult for us to believe that Congress did not intend this limitation to apply to the section next preceding it.

Respondent contends on its cross appeal that libellant failed to sustain its burden of proof of damages without showing the actual loss sustained by consignee. We do not agree.

Where goods over which suit is brought are not recoverable, the measure of damage is the value of the goods at the intended destination. *St. Johns Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119 (1923). In the case of damaged goods the measure of damage is the difference between market value of the goods at destination in the condition in which they should have arrived and market value of the goods at destination in the condition in which they arrived. *San Giorgio I* v. *Rheinstrom Co.*, 294 U. S. 494 (1935); *Reider* v. *Thompson*, 5 Cir., 197 F. 2d 158 (1952).

We hold that under the circumstances of the instant case the proper measure of damages was the difference between market value of the goods at the time and place they should have arrived and market value of the goods when they arrived.

We recognize that libellant is claiming rights obtained by subrogation, and the damages recovered must be those suffered by consignee. The sale by libellant to consignee, after unsuccessful attempts to sell to others, constitutes prima facie evidence of the diminution in value of the goods and thus, the extent of damage to consignee.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

## APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Friday, February 8, 1963

Before
Hon. John S. Hastings, Chief Judge
Hon. Latham Castle, Circuit Judge
Hon. J. Earl Major, Circuit Judge

| | |
|---|---|
| ATLANTIC MUTUAL INSURANCE COMPANY, *Libellant-Appellant, (Cross-Appellee).* | Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. |
| No. 13826-27 v. | |
| POSEIDON SCHIFFAHRT, G.m.b.H., *Respondent-Appellee, (Cross-Appellant).* | |

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, March 12, 1963

Before

Hon. John S. Hastings, Chief Judge
Hon. Latham Castle, Circuit Judge
Hon. J. Earl Major, Circuit Judge

| | |
|---|---|
| ATLANTIC MUTUAL INSURANCE COMPANY, *Libellant-Appellant, (Cross-Appellee),* v. POSEIDON SCHIFFAHRT, G.m.b.H., *Respondent-Appellee, (Cross-Appellant).* | Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. |

No. 13826-27

It Is Ordered by the Court that the petition for rehearing filed by libellant-appellant in the above entitled cause be, and the same is hereby Denied.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. The opinion of this Court filed on February 8, 1963,

2. The judgment of this Court entered on February 8, 1963 and

3. The order entered by this Court on March 12, 1963 denying the petition for rehearing.

Cause No. 13826 & 13827

ATLANTIC MUTUAL INSURANCE COMPANY,
Libellant-Appellant-Appellee

vs.

POSEIDON SCHIFFAHRT, G. m. b. H.,
Respondent-Appellee-Appellant

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of May A. D. 1963.

(Seal)

Kenneth J. Carrick
Clerk of the United States Court of Appeals
for the Seventh Circuit.
by. T. F. Struble, Deputy Clerk

## APPENDIX C.

46 U. S. C. A. § 1300-1315 The Carriage of Goods by Sea Act.

"1304. Rights and immunities of carrier and ship—Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of

their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.